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IN THE

Supreme Court of the United States

October Term, 1968

No. 589

JESUS ROLON MARXUACH,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Jesus Rolon Marxuach, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered against him in the above entitled case on July 11, 1968.

A. The Opinion Below

The opinion of the Court of Appeals in this case has not as yet been officially reported. It is set forth in Appendix A annexed to this petition.

B. Jurisdiction

The judgment of the Court of Appeals was entered on July 11, 1968. A rehearing thereon was denied on August 19, 1968.

Mr. Justice Abe Fortas on September 10, 1968, granted an order extending the time to file a petition for a writ of certiorari to and including October 1, 1960.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the First Circuit.

C. Question Presented

The question specifically raised by the petitioner, Jesus Rolon Marxuach, is:

1. Whether the petitioner was deprived of due process under the Fifth Amendment as well as his Sixth Amendment right to counsel of his choice?

D. The Statutes

The statutes involved are: United States Code, Title 21, Section 174; Title 26, Sections 4704(a) and 4705(a).

E. Summary Statement of Matters Involved

A three count indictment was returned against the petitioner and Miguel Soto Ayala, alleging the substantive violation of the aforesaid statutory provisions.

The petitioner was tried alone and found guilty as charged. He was thereafter sentenced to Twenty (20) years imprisonment, which he is now serving.

On appeal to the United States Court of Appeals for the First Circuit, the conviction of the petitioner was affirmed.

ONE

The petitioner was deprived counsel of his choice.

The instant deprivation of the right to counsel was threefold.

A.

The application for a continuance.

A defendant in a criminal prosecution has the right to be represented by counsel of his own selection and choice. *Johnson* v. *Zerbst,* 304 U.S. 458; *Glasser* v. *United States,* 315 U.S. 60. However, there is no dispute that the right to selection of counsel of one's choice may not be employed as a device or scheme or artifice to obstruct the even-handed administration of justice. *United States* v. *Bentvena,* 319 F. 2d 916 (2nd Cir. 1963). There is a reasonable limit as to the time allowed to a defendant to obtain his counsel. Once having obtained counsel of his choice, counsel may not unreasonably delay the trial because of other engagements, illness or incapacity. *Releford* v. *United States,* 288 F. 2d 298 (9th Cir. 1961).

Not to be overlooked are the further great truths flowing from the Sixth Amendment that a defendant has an unqualified right, if exercised at the appropriate time, to act as his own counsel and may reject counsel from being forced upon him. *Adams* v. *United States,* ex rel. McCann,

317 U.S. 269; *Minor* v. *United States,* 375 F. 2d 170 (8th Cir. 1967). Almost all these principles come into play in considering whether in a few short hours of trial, the petitioner was effectively denied due process under the Fifth Amendment to the United States Constitution as well as the right to counsel under the Sixth Amendment thereof.

The relationship between Court and counsel is not adversarial, even though there may be less than parallel objectives on the part of each. Counsel is an advocate for the defense, and the Court is an impartial legal arbiter.

Primarily, these definitions are not apposite when a mainland Judge is sent to Puerto Rico with the mission of clearing calendars. His concern, then, in moving cases for trial or disposition is overlaid by the knowledge of a stern review of his productive, administrative ability in accomplishing movement on the calendar. Judge Boldt, the Trial Judge here, obviously a man of inexhaustible energy, worked better than twelve hours a day in the Court room itself in discharging this administratively-conceived task. His strength, however, was not the strength of all who participated in this case.

On October 3, 1967, all parties appeared in Court at 9:15 a.m. (TR 2).[1] A panel of prospective jurors was available and present. The defense had earlier filed a Motion for Continuance which the Judge chose to hear in chambers. This motion for a continuance was predicated upon the illness of the co-defendant, Soto-Ayala who had been hospitalized. The Court severed Soto-Ayala and ordered the petitioner's trial to proceed. At this time and in chambers, the Government informed the Trial Court that an explosive device had allegedly been attached to the car of one of the two principal witnesses for the Government.

[1] TR refers to the transcript of the trial of the petitioner Jesus Rolon Marxuach.

The apparent friction which had been generating tenseness between defense counsel and the Court caused an explosion of its own in chambers. The Court had just castigated counsel for "a continuous series of applications for continuance" (TR 5) and said that "I do not propose to accept any statement made by or on behalf of the Defendants or their counsel which are not substantiated by sworn testimony of affidavit." (TR 6). In another case, counsel had been threatened with disbarment and contempt by Judge Boldt. See *United States* v. *Goitia,* Tr. T. 27 October 2, 1967, Cr. 59-67, USDC P. R. Defense counsel were obviously nursing what they considered to be assaults upon their personal integrity while the Assistant United States Attorney described the exceedingly serious development of the alleged discovery of an apparent threat to the life of a witness. In this context, defense counsel was asked by the Court if he had "any knowledge of these matters." (TR 10). The query was nought but fantastic. The concomitant reaction was of gasping disbelief and an aggravation of a pre-existing cardiac condition of Benicio Sanchez Castano, the petitioner's trial counsel. It was incredible that the Court could think that he would either participate or have knowledge of such participation.[2]

The Court thereupon, compounding the insult sought to explain its question by asserting that its intention was not one of personal accusation. To this, response was made, as only it could, by the query "How could we have knowledge of these things, Your Honor, without being in the conspiracy?" (TR 15).

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[2] The Court of Appeals held that Judge Boldt's "perhaps unfortunately phrased question doubtless sprung from its understandable disturbance over the bombing incident." Page 3 of the slip opinion. However, it might not be amiss to note that respect and loyalty are reciprocal.

Mr. Sanchez left the Court for examination by his physician, an outstanding cardiologist, and the Court proceeded to conduct a hearing in his absence on the Government's motion to revoke the petitioner's bail. The record does not indicate that the petitioner was advised of his counsel's illness, probable incapacity or probable incapability to represent him further. Later in the morning, the Court stated that it would empanel a jury at 2:30 in the afternoon, with no concern as to whether Mr. Sanchez would be present or not. (TR 69-70). At five minutes to one on the same day, there was delivered to the Court a sworn certificate by Dr. Arrillago Torrens which indicated the incapacity of Mr. Sanchez. Mr. Andreu, who had been forbidden to leave, pointed out to the Court that Mr. Sanchez was the attorney retained by the petitioner to try this case. (TR 72). The Trial Court however reiterated its prior determination that Mr. Andreu was to conduct the trial and the application for continuance based upon the sudden illness of Mr. Sanchez was denied. (TR 77).

The foregoing transpired out of the presence of the petitioner who was neither consulted by the Court as to choice or selection of counsel, nor inquiry made of his relationship with counsel until the trial was underway. Then, what colloquy did occur, did so only at the insistence of the petitioner.

In the chronology of events, at 2:55 P.M. the trial began. During the course of the empanelling of the jury, the petitioner, so far as the record reflects, was initially advised that the trial would proceed and was proceeding in the absence of his chosen and retained trial counsel, Mr. Sanchez. The petitioner through Mr. Andreu, then asked to address the Court and permission was refused. (TR 92). Subsequently, Mr. Andreu again informed the Court that the petitioner insisted upon addressing the Court and again

permission was denied. The Court allowed Mr. Andreu to come to the bench and out of the hearing of the jury, Mr. Andreu advised the Court that the petitioner ". . . insists that I am not his attorney. Now, Mr. Sanchez was retained by me, and that I represented only Mr. Miguel Soto, that I am not authorized by him to carry on with any questions. So, I don't know what to do. If it do it . . ." (TR 109-110). The Court chose to disregard the grave considerations including the obvious conflict of interest existent between the defendants.

The jury was very quickly empanelled and the Court ordered that opening statements be made. At that moment, Mr. Andreu again sought permission to address the Court and the following took place at the side bar out of the hearing of the jury:

> "You have forced me to proceed to empanel a jury even though the defendant has informed you through me that he does not want me to represent him in this case because his case was to be handled by Mr. Benicio Sanchez Castano, who became ill this morning in chambers while you carried on an investigation. As a consequence of certain comments or questions that you propounded to the defendants, the defendant, before you empanelled the jury, communicated through me to you that he wanted to address you. Right now you are proceeding without hearing the defendant, and you are proceeding to try him and even indicated that you would like to have the District Attorney make his presentation of the opening statement to the jury. Your Honor, as an officer of the Court I think that Mr. Rolon-Marxuach, no matter what his reputation is, should not be tried in this way. He should be given a fair opportunity of having the counsel of his selection, Mr. Sanchez Castano, to participate in his trial. (TR 124-125)

Proceedings then continued before the jury in open Court and in the presence of the petitioner. The Court had given permission for the jury to leave until the following morning when the petitioner, again asked the Court for permission to speak, and the following colloquy occurred:

> The Defendant: May it please your Honor, I would like to make a statement to the Court.
>
> The Court: Please be seated, Mr. Marxuach.
>
> The Defendant: I want to have the opportunity to make a statement to you.
>
> Mr. Andreu: Your Honor, excuse me, the defendant has repeatedly asked your Honor, he wants to address the Court.
>
> The Court: I am going to allow him to do that as soon as we recess, then he can address the Court at that time. But I want to let the jurors get on their way home tonight.
>
> The Defendant: He doesn't represent me, Your Honor.
>
> The Court: Mr. Rolon, if you do not take your position and conform to the directions of the Court, the Court will have to take some action.
>
> The Defendant: I am compelled to go to trial without any attorney. (TR 128-129)

The jury was excused. The petitioner, for the first time, was permitted by the Court to state that he had retained Benicio Sanchez Castano as his trial attorney (TR 131). He stated that Mr. Andreu was acting as the attorney for his co-defendant, Soto-Ayala (TR 152). The protestations of the petitioner were not acted upon by the Court.

Thereafter, Mr. Andreu again raised the propriety of his representing the petitioner. The Court apparently in

an effort to foreclose any further discussion about this matter, inquired as to whether Mr. Andreu had been paid by the petitioner. Upon being advised by Mr. Andreu that he had not, but that to the contrary Mr. Sanchez Castano had been paid, the Court appointed Mr. Andreu as counsel for the petitioner and directed him "to proceed diligently with all that may be required to get this case tried." (TR 167).

It is submitted that the Trial Court did in fact abuse its discretion in not granting a continuance to the petitioner. Indeed it denied him due process by compelling him to proceed to trial without retained trial counsel of his choice.

There was no thorough and complete inquiry by the Trial Court as to the retainer agreement with Mr. Sanchez Castano. The Court contented itself with a few questions as to what the record appeared to reflect. The Court did not consider the protestations of Mr. Andreu nor indeed the statements of the petitioner.

The relationship between the attorney and client is personal and intimate. Here Mr. Andreu specifically and unequivocally informed the Court that Mr. Castano was the petitioner's retained trial attorney. Moreover that he, Mr. Andreu represented a severed co-defendant, Soto-Ayala. The request for a continuance was not unreasonable under the circumstances of Mr. Sanchez's illness. This unfortunate occurrence was in no way attributable to the petitioner nor can he in any way be charged with responsibility thereto.

The petitioner did not then contend that there should have been a lengthy continuance. *Releford* v. *United States, supra.* His plea and his request was that he was not being represented by his counsel and he wanted counsel of his own choosing.

The Court in its haste to try this case did not consider, or, if it did consider, ignored the legal implications of assigning Mr. Andreu to represent the petitioner. For if the Court made inquiry as to the relationship between Mr. Sanchez Castano and the petitioner, vis-a-vis that between the petitioner and Mr. Andreu, it would have realized the validity of his claim. Mr. Sanchez Castano became in actuality the lawyer for the petitioner at the time that bail was set. The record discloses that this bail was fixed at the time of his arrest. Indeed Mr. Sanchez Castano appeared as counsel for the petitioner at a time almost coincidental with the alleged appearance of Mr. Andreu. The mere circumstance as to whose name appeared first and in whose office a motion was prepared is not of any binding significance in the determination of the relationship. What is significant is what the parties consider it to be.

There is nothing unusual for two counsel appearing for co-defendants to utilize their office facilities in a manner which is most efficient for them. The question of competency or prejudice was specifically found to be nonexistent in *Releford.* The attorney who tried the case apparently represented Releford more than adequately and "no actual prejudice was shown with respect to his participation in the trial as counsel for Releford." *Releford* v. *United States, supra,* page 302.

The distinction without a difference referred to above is that concededly there had been some attorney-client relationship between Mr. Andreu and the petitioner. The record supports the petitioner's contentions that the attorney-client relationship did not include representation at this trial. Therefore, Mr. Andreu was, at most, in essence equivalent to the office associate in *Releford.* Applying *Releford* to this case, the conclusion is inescapable that "there have been complete disregard of the defendant's

right to choose his own counsel," and therefore "prejudice will be assumed." *Releford* v. *United States, supra,* page 302.

The Court should have granted the motion for a continuance *sua sponte.*

There would have been little if any impediment to the administration of criminal justice if this case had been adjourned for a week. For then the petitioner being advised that in the event Mr. Sanchez was unavailable to try this case within that time, he was obliged to appear with counsel of his choice or run the risk of being considered to have waived counsel. This procedure would have been in accord with the accepted constitutional standards under the Sixth Amendment. *Releford* v. *United States, supra,* Cf. *Bentvena* v. *United States, supra.* A continuance would have averted the problems apparent in this case. The Government had other cases to try involving the same witnesses and it tried cases subsequent to this one involving the same witnesses. A week's adjournment or continuance because of the illness of a distinguished member of the bar of the District of Puerto Rico was not an extreme request. Its denial, was an abuse of discretion on the part of the Trial Court. This continuance should have been granted.

Releford v. *United States, supra,* should be controlling as to the facts and circumstances of this case. True, certain distinctions may be noted in the factual pattern as between the two cases, but it is respectfully suggested that they are insubstantial. In *Releford,* the defendant had retained an attorney who became ill shortly before the trial date. On the trial date, an attorney who shared the offices of the retained counsel appeared in Court on behalf of the defendant and sought a continuance. The continuance was denied and the defendant was forced on to trial with the associate of his retained attorney. There

was no expressed rejection of this new counsel by the defendant but instead he stated a preference for the attorney whom he had retained. The Court of Appeals for the Ninth Circuit, in unanimously reversing, held that the Defendant had been denied the right to counsel of his own choice and stated:

> "... A person charged with crime in a federal court is entitled under the Sixth Amendment to the assistance of counsel for his defense. Johnson v. Zerbst, 304 U.S. 458, 463, 58 S. Ct. 1019, 82 L. Ed. 1461. Where such a person is able to obtain counsel for himself and does not ask the court to appoint counsel, he must be given a reasonable time and a fair opportunity to secure counsel of his own choice." *Releford* v. *United States, supra,* page 301.

B.

There was a conflict of interests and Mr. Andreu should not have been assigned to represent the petitioner.

Mr. Andreu represented the severed co-defendant, Soto-Ayala. That fact alone should have been sufficient to preclude his assignment as counsel for the petitioner.

Beginning with *Glasser* v. *United States, supra,* there has been a growing awareness of the danger involved in one lawyer representing more than one defendant in a criminal prosecution. Of course, there are cases in which representation by counsel of two or more defendants does not derogate the right to counsel as to any defendant. However, the Courts have scrutinized each situation to determine whether, as here, the Sixth Amendment has been violated.

In *Glasser* v. *United States, supra,* there was a infringement upon the right to counsel by a non-conflicting joint

representation of retained counsel of an indigent defendant without the consent of the retained client. While in this case, we can show the prejudice that accrued to the petitioner, we respectfully submit, that such is unnecessary. The Supreme Court has held that:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial . . . Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the Court." *Glasser* v. *United States, supra,* page 76.

There can be no serious argument raised in opposition to the petitioner's right to be represented by an attorney devoted solely to his interests. *McKenna* v. *Ellis,* 280 F. 2d 592 (5th Cir. 1960). To protect this singular devotion to one in the same position as the petitioner, the Court of Appeals for the District of Columbia Circuit has imposed a fact-finding burden upon the Trial Court. *Lollar* v. *United States,* 376 F. 2d 243 (D.C. Cir. 1967). The Court found this duty as a virtual command of the Supreme Court in *Johnson* v. *Zerbst, supra,* at page 465:

> "This protecting duty imposes a serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be

fitting and appropriate for that determination to appear upon the record."

The petitioner was denied this minimum standard of protection by the Trial Court.

> "Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney . . ." *Campbell* v. *United States,* 352 F. 2d 359, 360 (1965)

There should have been no affirmative determination because the petitioner, rather than be represented by the same counsel as his co-defendant with conflicting interests, specifically disclaimed any representation by Mr. Andreu.

Whether Mr. Andreu was assigned by the Court or had been retained by the petitioner, the same infirmities were present. As the Court said in *Lollar:*

> "Certainly, whatever risks and disabilities inhere in joint representation inhere whether counsel is appointed or retained; and whatever steps a defendant is entitled to take to avoid such problems should be made known to him whatever his economic situation may be. Therefore, since nothing in the record indicates that appellant was so advised, he of course cannot be said to have waived rights of which he was unaware." *Lollar* v. *United States, supra,* page 246.

If Lollar is controlling, then the representation of the petitioner by Mr. Andreu is clearly in violation of his Sixth Amendment right. The failure of the Court to inquire into the possibly highly-prejudicial situation which arose from the joint representation by counsel was and is error.

The prejudice apparent from the joint representation stands out in bold relief. Mr. Andreu represented the co-defendant Soto-Ayala whose defense was that the transaction which formed the basis of the Indictment had never occurred. However in so contending, he admitted that he did in fact meet with a Government informer at about the times and places charged. The defense underlying the apparent trial strategy, if such may have been said to have existed, was that the petitioner was not present and that the Agents who allegedly saw the transaction were not telling the truth beyond a reasonable doubt in describing their observations. As the defendant Soto-Ayala had been severed he could take the witness stand and testify in his own behalf without running the risk of his own testimony incriminating him in the sense of having the jury find him guilty. If his testimony were to be accepted by the jury, then of course, it would be highly questionable as to whether the Government would press its case as against him. If, on the other hand, the jury found the petitioner guilty, it might be propitious for the witness Soto-Ayala to seek to work out his compromise plea rather than face conviction under the mandatory five-year minimum imprisonment section of the Indictment. Soto-Ayala's testimony corroborated material aspects of the Government's case. The movements and presence of the witness Soto-Ayala and of the informer were corroborated by the co-defendant Soto-Ayala. The jury then found itself confronted with support and substantiation of the Government's case from the mouth of a petitioner's witness. The conflict of interest is obvious.

The degree of prejudice suffered by the petitioner can in no way be construed beyond a reasonable doubt to have been harmless error. *Chapman* v. *California,* 386 U.S. 18 (1967).

The example given above in describing the possible motives incorporated in the testimony of Soto-Ayala and the effect thereof creates much more than a reasonable doubt. The dire predictions stated above came to pass as Soto-Ayala subsequently took advantage of the situation by pleading not guilty to the Internal Revenue violation contained within the Indictment and was sentenced to two years under the less onerous provisions of that statute.

There was no duty upon the Trial Court to assign counsel to the petitioner. But there was a duty upon the Trial Court to see that the petitioner was represented by retained counsel of his choice and receive the full and undivided services of that counsel. The improvident situation which the Court created as to representation of the petitioner, was not of the petitioner's doing nor should he be held accountable thereto. For it stands constant that Mr. Sanchéz was retained by the petitioner to represent him at trial. That Mr. Sanchez became ill, in no small measure because of the callous conduct of the Trial Court. The petitioner was thereupon counselled to proceed to trial without Mr. Sanchez at his side.

C.

Appellant did not have effective counsel.

The Trial Court refused to accept the self-deprecatory assessment of Mr. Andreu as to his qualifications to try a Federal criminal case, i.e. his lack of knowledge as to the Federal Rules of Criminal Procedure, his unfamiliarity with federal practice and his difficulties with the English language.

Mr. Andreu totally ignored or was unaware of the highly-beneficial provisions of Section 3500 of Title 18. We do not know what benefits may have been derived from a cross-

examination keyed to reports made by the officers who testified in this case. In fact, we do not know whether reports had been made. Indeed, we do not even know whether reports had been made and wilfully destroyed so that the punitive provisions of Section 3500 of Title 18 might have been employed in order to strike their testimony.

There was no motion made for the production of the Grand Jury testimony, if such did exist, of the testifying Agents.

At the close of the Government's case, there was no motion made pursuant to Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal. There was no motion made at the close of the entire case under Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal. There was no motion made pursuant to Rule 29 and Rule 33 of the Federal Rules of Criminal Procedure after the jury had returned its verdict. Nor was time reserved to make such motions in the event that sentence date was more than seven days after the return of the jury's verdict. Mr. Andreu unquestionably was candid when he advised the Court that he had no familiarity with the Federal Rules of Criminal Procedure. Judge Boldt, at this point, stated that he would help Mr. Andreu and certainly that a lawyer of so many years experience would have no difficulty with the trial of a Federal case. The colloquy between the Court and Mr. Andreu is as follows:

> "I wish to state, Your Honor, that Mr. Sanchez, as he told you this morning and as the records of this Court shows, is the person that was retained by Mr. Rolon-Marxuach to carry on with the empanelling of the jury as I do not practice in this court, Your Honor. The last time I practiced here was many years ago, and I have also my inconvenience with the language.

The Court: You speak every bit as well as he does, of course. As a matter of fact, I understand you much better than I do Mr. Sanchez.

Mr. Andreu: I thank you again for that, Your Honor.

The Court: I mean that most genuinely.

Mr. Andreu: I do not know the Federal Rules of Criminal Procedure. I may come to a point in which I will be embarrassed, and that is why I retained Mr. Sanchez.

The Court: I don't think there need be any difficulty in that respect, Mr. Andreu. Anything that you wish to know, I will be glad to inform you. (TR 72-73)

Needless to say, the record discloses neither exchange of information nor assistance, though both were sorely needed. In any event the combined efforts of Court and Counsel are not a fair substitute for counsel, selected and retained by petitioner.

CONCLUSION

For the reasons hereinabove set forth this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

THEODORE KRIEGER
On the Brief

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 7064

JESUS ROLON MARXUACH,

Defendant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

BENICIO SANCHEZ RIVERA, with whom ALBERT J. KRIEGER was on brief, for appellant.

CHARLES E. FIGUEROA, Assistant U. S. Attorney, with whom FRANCISCO A. GIL, JR., United States Attorney, and BLAS C. HERRERO, JR., Assistant U. S. Attorney, were on brief, for appellee.

July 11, 1968.

ALDRICH, *Chief Judge.* Defendant Rolon Marxuach was convicted on three counts of an indictment involving a transfer of 125 grams of heroin on March 28, 1967, allegedly

violating 26 U.S.C. §§ 4704(a) and 4705(a), and 21 U.S.C. § 174, and he appeals. Because of the questions raised, a detailed recitation is required.

The defendant was arrested on July 17. On August 7 an indictment was returned charging him and a co-defendant Soto Ayala. Arraignment was set for August 11. On August 11 the defendants appeared, both represented by a single attorney, Mr. Cesar Andreu Rebas, who asked for a ten-day continuance to plead. This request was granted. On August 21 the defendants pleaded not guilty. Attorney Andreu announced to the court that Mr. Benicio Sanchez Castano was joining him as co-counsel for each defendant. The court gave defendants until September 11 for motions, and stated that trial was provisionally scheduled for September 18, later changed to September 25. On September 11 defendants moved for particulars and for a continuance. The court on September 15 ordered the particulars, which were furnished on September 21, and the case was continued for trial to be had on October 2. On September 27 defendants filed a further motion for continuance, with accompanying affidavits. This motion was denied on October 2, and it was ordered that the jury be empanelled the following day. On October 3 defendant Soto failed to appear. Defendant Rolon moved for a continuance on the ground that Soto was in the hospital, alleging simply that he was "an important witness." The motion—as had been all other motions—was signed by both of the aforementioned counsel. The court denied the motion. This denial presents no question, as Soto did testify at the eventual trial.

Also on October 3, a bomb was discovered attached to the automobile of a government witness. When this was brought to the attention of the court at a hearing in cham-

bers the court inquired of defendants' counsel if they knew anything about it. This question upset Mr. Sanchez, aggravating a heart condition and causing him to be hospitalized. In connection with the bomb, the government witness testified that Rolon, on September 18 in the courthouse, had threatened not to "permit" him to attend the trial. Thereafter Rolon sought a continuance in the light of Mr. Sanchez's hospitalization and stated that he did not wish to be represented by Mr. Andreu. The court denied the motion, designated Mr. Andreu to be counsel, empanelled a jury, and ordered trial for Rolon to commence October 4.

On October 4 defendant Rolon failed to appear. Testimony was received from the attending physician that although Soto had had his appendix removed on October 2, there were no objective symptoms or other medical indications, either before or after the operation, to confirm Soto's reported pain or any need for the operation. Later in the day Rolon was discovered in a hospital. The physician at this hospital reported that Rolon had nothing the matter with him, and he was brought to court in the custody of the marshal. Bail was thereupon revoked.

Rolon's trial finally commenced on October 6, and he was convicted.

We deal first with Rolon's contention that he was deprived of effective representation of counsel. In so doing we readily concede that Mr. Sanchez, whose reputation is well known to this court, was not falsifying either as to his ignorance of the bombing, or as to his physical condition. The court's perhaps unfortunately phrased question doubtless sprung from its understandable disturbance over the bombing incident. At the same time, at this stage of the proceedings a continuance was not due simply as a

courtesy to Mr. Sanchez. The sole question is whether it was error to designate Mr. Andreu to try the case. This question arises, as has been apparent, in a vey unusual factual situation.

We, of course, agree that a defendant is entitled to proper representation, which means that counsel should be competent, and have adequate time to prepare. In the present case there can be no question as to the latter. Mr. Andreu had from the very beginning actively represented Rolon as well as Soto, whose case the record shows to be identical. Nor can there be any question as to his competency, with one possible exception.

On his own admission Mr. Andreu had been an active practitioner for over 30 years, mostly on the criminal side. His self-asserted disqualifications were the following.

1) He has "inconvenience" with the English language, and feared to be "embarrassed". To this there are three answers. The first is the court's statement that it found Mr. Andreu easier to understand than Mr. Sanchez. The second is our review of the transcript, which shows Mr. Andreu's more than adequate command of English. The third is the admission made before us that Mr. Andreu had expected to represent Soto at the trial while Mr. Sanchez represented Rolon. He could not be "embarrassed" for one and not for the other. Thus we can only regard this self-deprecation as totally unfounded.

2) Mr. Andreu was inexperienced in the federal court. Except as regards matters involving the federal rules we cannot consider this a significant matter.

3) Mr. Andreu was unfamiliar with the federal rules. This is a matter, viewed theoretically, of some possible moment. However, we may assume that if Mr. Andreu

was going to try the case on behalf of Soto in any event, he had been familiarizing himself with the federal rules in anticipation. If, for some reason, he had not done so, he had two days until October 6 to obtain associate counsel who could remedy that deficiency. There is no suggestion that Rolon was impoverished and could not afford this assistance.

In sum, we will not hold the court's determination that Mr. Andreu was competent to try the case an abuse of discretion.

As a subsidiary matter we recognize the duty to give consideration to a defendant's preference with respect to representation, as long as the expeditious handling of his case is not impeded. *United States ex rel. Davis* v. *McMann*, 2 Cir., 1967, 386 F. 2d 611, *cert. denied* 390 U.S. 958; *Releford* v. *United States*, 9 Cir., 1961, 288 F. 2d 298. However, this subsumes good faith on the part of the defendant, something the court had abundant reason for questioning. Quite apart from the defendant's objective behavior in this case, previously recited, it was called to the court's attention that Mr. Andreu had successfully defended him on a murder charge some years earlier. Even if we assume that the defendant preferred Mr. Sanchez to Mr. Andreu the court could well conclude that Mr. Andreu was in no way personally objectionable. Under these circumstances the court was well warranted in regarding other matters as more important than giving full rein to the defendant's preference between his two lawyers. See *United States* v. *Bentvena*, 2 Cir., 1963, 319 F. 2d 916, *cert. denied* 375 U.S. 940.

Finally, we note briefly defendant's contention, made for the first time in this court, that a conflict of interest was involved in having Mr. Andreu represent him. No such

conflict had been discovered hitherto, and none was suggested to the district court. Mr. Andreu and Mr. Sanchez had together represented both defendants from the time that Mr. Sanchez entered his double appearance. We persistently asked counsel on this appeal where the alleged conflict lay, and received no substantive answer. We have correspondingly searched the record and find none. It might not be inappropriate to add, as an additional matter, that where the defendants had been severed for trial at the last minute, and only for what the court found to be the feigned illness of Soto, it seems particularly reasonable that the court should require Mr. Andreu to continue to represent Rolon as he had hitherto. In so saying we do not deny that as a matter of general principle we are peculiarly sensitive to a showing of conflict of interest, if such can be suggested. *Cf. Morgan* v. *United States,* 2 Cir., 2/21/68.

With respect to the trial itself, defendant asserts that it does not appear that the interpreter was sworn. We have recently rejected such a formal contention first made on appeal as not approaching plain error. *Defino Martone* v. *United States,* 1 Cir., 6/13/68. The circumstances here are no different.

Next, defendant complains of judicial intervention in the trial. We have reviewed the record, and find no error.

Defendant also complains that during closing argument the assistant U. S. Attorney referred to him as a "big fish". On objection the court immediately struck the characterization. This case is in no way similar to defendant's only citation, *Greenberg* v. *United States,* 1 Cir., 1960, 280 F. 2d 472. The remark here was not of serious proportion considering the size of the transaction involved ($4,500 paid for 125 grams of heroin), and, certainly after the

court's prompt action, not prejudicial error. *Cf. Az Din* v. *United States,* 2 Cir., 1956, 232 F. 2d 283, *cert. denied* 352 U.S. 827.

Finally, we deal briefly with defendant's claim that there should have been a continuance because of pretrial publicity. With one minor exception this publicity took place in July, when the arrest of the defendant, and a number of others, occurred. While the newspaper items were certainly not the type one would want read in the jury room, defendant's attempt to compare this case with *Sheppard* v. *Maxwell,* 1966, 384 U.S. 333, and *Delaney* v. *United States,* 1 Cir., 1952, 199 F. 2d 107, falls wide of the mark. Of equal if not greater importance, defendant makes no answer to the antiseptic effect of an interrogation of the jurors by the court, which was both specific and thorough. In connection with pretrial knowledge the jurors, some collectively and the rest, individually, were asked the following question:

> "Do any one of you now after this inquiry that we have made have any memory or recollection of ever having read or heard or read in any newspaper or anywhere else anything about either the defendant Rolon Marxuach or this case or the co-defendant Soto Ayala?"

None answered affirmatively. That a defendant could claim prejudice because of newspaper accounts of his arrest published over two months prior that no juror recalled having seen or heard of passes understanding.

Affirmed.

APPENDIX B

Constitutional Provisions

AMENDMENT 5, UNITED STATES CONSTITUTION.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT 6, UNITED STATES CONSTITUTION.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

JESUS ROLON MARXUACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Puerto Rico, petitioner was convicted on three counts charging violations of the federal narcotics laws. On October 13, 1967, he was sentenced to imprisonment for concurrent terms of twenty years and fined $20,000. The court of appeals affirmed (Pet. App. A).

1. As part of intensive undercover operations against Puerto Rican narcotics traffic during the spring

of 1967, Estoban Mendoza, an informant, arranged to purchase 125 grams (about one quarter pound) of heroin from Miguel Soto-Ayala (R. 355).[1] On March 28, the two met in San Juan and went to a local hotel, where petitioner joined them (R. 241-247). Mendoza gave petitioner $4500; petitioner counted the money and gave his car keys to Soto-Ayala, who then went to petitioner's car, removed a white package from its trunk, returned, and gave the package to Mendoza (*Ibid.*, R. 329-333). Later, Mendoza gave the package to a government agent, Jorge, who had witnessed the transfer; analysis showed that it contained 125 grams of heroin (R. 368).

Petitioner and Soto-Ayala were among those arrested at the close of the undercover operations. Together with defendants in other cases resulting from these operations, they retained the services of Cesar Andreu Rebas, an experienced criminal lawyer who previously had been successful in defending petitioner against a homicide charge (R. 74-75, 132, 139). Mr. Andreu was later joined as counsel of record for the two by Benicio Sanchez Castano; Mr. Sanchez then assumed the primary responsibility for petitioner's defense, while Mr. Andreu concentrated on Soto-Ayala. The two cases were severed for trial.

Trials in the cases resulting from the undercover operations were being held in the late summer and early fall of 1967. Apparently as a result of incidents in other cases as well as the present ones, the trial

[1] "R." refers to the three-volume record of the proceedings in the district court, including the transcripts of the trial and pretrial hearings, filed with the Clerk of this Court.

judge came to believe that counsel were seeking to delay trial when, after several earlier postponements in connection with pre-trial motions,[2] a motion for continuance was filed shortly before the day set for trial, Oct. 2. On Oct. 2, he denied the motion and directed that a jury be empaneled the following day.

By the time court convened the next morning, Soto-Ayala was in a hospital claiming symptoms of appendicitis, which laboratory tests and an operation subsequently performed out of an abundance of caution showed he did not have (R. 194-205), and an explosive device had been found attached to agent Jorge's car (R. 24-30). Alleging the bombing attempt and threats made by petitioner against Jorge after it had become known that the latter would be a witness against him, the government moved for revocation of petitioner's release on bail. The court asked defense counsel if they knew of the bombing incident. Mr. Sanchez, who had a heart condition, became highly upset, and the following colloquy occurred:

> THE COURT: I want to say here among ourselves, for some reason or other, Mr. Sanchez, you and Mr. Andreu take personal offense when certainly none is intended. I have not sought to offend either one of you. I have only sought to do what I conceive to be my duty. I am not in any way implying that either of you are involved in any schemes or conspiracy or the like. I am only reciting the record, that is all, and if you have considered that somehow or other I have implied

[2] The chronology of pretrial continuances may be found in the opinion of the court of appeals, Pet. App. 2a.

that you are involved in anything to the contrary, please be assured that I do not do it, and I will not do it until I am presented with evidence supporting such a thought.

But I must say that what I have said about the continuous efforts to procure a later trial or a continuance or a postponement of the trial stands as stated, and whatever implications may arise from that, just arise.

I think you should not just immediately assume in each instance, as you did here a few minutes ago, that somehow or other I was impugning your integrity. All I said a few minutes ago was, "Do you have any knowledge of these circumstances?"

MR. ANDREU: How could we have knowledge of these things, Your Honor, without being in the conspiracy.

THE COURT: It would be possible that you heard about this threat against Jorge. [R. 14-15.]

Empaneling of the jury was then deferred on Mr. Sanchez's representation that he had to see his doctor, but could return by afternoon, and the remainder of the morning was devoted to a hearing on the motion to revoke bail [3] and an inquiry into the whereabouts of Soto-Ayala, at that time unknown.

Mr. Sanchez proved unable to return, as attested by

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[3] The motion was denied, but petitioner was firmly warned to be present the following day. He did not appear and was eventually found at a hospital claiming "chest pains"; hospital officials informed the court that he was neither ill nor incapable of having informed the court of his whereabouts, and the court ordered him taken into custody (R. 183 *ff.*, 216).

his doctor's certificate;[4] Mr. Andreu requested a continuance, on the grounds that he had not practiced in federal court for several years, that he had difficulties with English, and that Mr. Sanchez had been retained by petitioner to represent him during the empaneling of the jury and trial (R. 72). The court refused the continuance[5] and directed Mr. Andreu to represent petitioner, which he did over the latter's objection. Mr. Andreu appears to have had petitioner's full cooperation and assistance throughout (R. 126, 580), and, the judge remarked (R. 593-594), gave him a vigorous and thorough defense.

2. All of petitioner's claims relate to the court's action in designating Mr. Andreu as his counsel and Mr. Andreu's conduct of his defense. As the court below properly held, these claims must be adjudged in the very unusual factual situation of this case; as such, they present no issues of general importance meriting this Court's consideration.

In particular, the court's action must be judged against the background of an apparent attempt on the life of a crucial government witness (suggesting sound reason for expeditious hearing of the case), previous and contemporaneous efforts by petitioner and his codefendant to delay the trial as long as possible, and the fact that Mr. Andreu had been petitioner's designated counsel of record from the time of arrest. As the court below stated, "at this stage of the

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[4] As did the court below, the government concedes that Mr. Sanchez was not falsifying as to his knowledge of the attempted bombing or his physical condition.

[5] In fact, for various reasons the trial itself did not begin until October 6.

proceedings, a continuance was not due simply as a courtesy to Mr. Sanchez" (Pet. 3a-4a); there were here both sound reasons for prompt hearing of the case and ample grounds for assurance that counsel would be familiar with the case, and not personally objectionable to petitioner.

The right of representation by counsel of one's own choice assumes the defendant's good faith; it carries the reasonable condition that it cannot be asserted so as to obstruct the orderly procedure of the courts or to interfere with the fair administration of justice. *United States* v. *Bentvena*, 319 F.2d 916 (C.A. 2), certiorari denied *sub nom. Mirra* v. *United States*, 375 U.S. 940. A trial judge confronted with a defendant who has obtained numerous delays and has constantly employed dilatory tactics must, in the exercise of sound discretion, "do what is reasonably necessary to meet the situation." *United States* v. *Bentvena, supra*, at 936. This may sometimes require appointment of counsel against the wishes of a non-indigent defendant. *United States* v. *Abbamonte*, 348 F.2d 700 (C.A. 2), certiorari denied, 382 U.S. 982; *United States* v. *Dardi*, 330 F.2d 316, 335 (C.A. 2), certiorari denied, 379 U.S. 845.

Mr. Andreu suffered no incapacity which made his appointment, in particular, erroneous. He was an experienced criminal lawyer, already familiar with the case through his participation as counsel. His claim to difficulties with English, disbelieved by the judge (R. 72-73), is belied by the transcript. His claimed unfamiliarity with the Federal Rules of Criminal Procedure could readily have been remedied, as pointed

out by the court below, and is cast in some doubt by his representation of Soto-Ayala and his participation in earlier defense motions under those Rules. Although Mr. Andreu failed to demand production of the written statements of the government witnesses, or to move for a judgment of acquittal at the close of testimony, these omissions hardly demonstrate ineffectiveness. There clearly was enough evidence to make guilt or innocence a jury question, so that counsel might have decided, as a matter of strategy, not to delay matters further with frivolous acts. With regard to the lack of motions pursuant to 18 U.S.C. 3500 for the production of statements made by agents, it is apparent that the attorney made no request for the statements because he already had them (R. 369).[6] Thus, petitioner has failed to show incompetence or possible prejudice in the only respects in which he claims either.

Finally, there is no basis for the objection—never made at trial,[7] but still carefully reviewed by the court of appeals (Pet. 5a-6a)—that there was a con-

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[6] Mr. Andreu had extensive experience in the Puerto Rican courts, where the right to demand production of the statements of government witnesses had been recognized since 1961. *People* v. *Ribas*, 83 P.R.R. 371.

[7] See *Glasser* v. *United States*, 315 U.S. 60, 76. Not only did Mr. Andreu fail to object to his appointment on conflict of interest grounds, but when the court subsequently appointed additional counsel for Soto-Ayala, in advance of Soto-Ayala's testimony (R. 323-325), this counsel also failed to object. The additional counsel had been appointed, not because of possible conflict, but to ease the burden on Mr. Andreu, who was to defend Soto-Ayala and another alleged narcotics offender in their trials shortly after the conclusion of petitioner's.

flict of interest between petitioner and Soto-Ayala which should have precluded Mr. Andreu, petitioner's counsel of record since arrest, from representing petitioner at trial. Petitioner's defense was that he was not in Puerto Rico at the time of the alleged transaction, but was in New York City. Soto-Ayala, who testified for petitioner, stated that he saw petitioner in Puerto Rico on March 26 and April 1 (R. 492, 503) but not on March 28, the date he met with Mendoza. His purpose in meeting Mendoza, he alleged, was to receive repayment of a loan (R. 438), and he denied selling any heroin to Mendoza (R. 452). Nothing Soto-Ayala said in any way implicated petitioner. For this reason the defense had intended to use him as a witness even before Mr. Sanchez became ill (R. 6, 73-74, 131).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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